Supreme Court, U.S.
FILED
SEP 20 1995
CLERK

(2)

No. 95-330

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

CHARLES HENRY CUNNINGHAM,
Petitioner,
vs.
WHITTIER UNION HIGH SCHOOL DISTRICT, et al.,
Respondents.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

LYNBERG & WATKINS
A Professional Corporation
NORMAN J. WATKINS, STATE BAR #87327
2020 East First Street, Suite 101
Santa Ana, CA 92704-4015
(714) 973-1220

Attorneys for Defendants/Respondents, Whittier Union High School District, a school district of Los Angeles County, Whittier High School, A subdivision of Whittier Union High School District, Paul Muschetto, Lee Panagos and Ron Perry

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

13 PP

QUESTION PRESENTED

1. Whether grounds exist for granting the petition.

2. Whether petitioner failed to timely raise issues set forth in his petition before the California Superior Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

I. JURISDICTION 1

II. CONSTITUTIONAL PROVISIONS INVOLVED 2

III. STATEMENT OF THE CASE 2

IV. REASONS FOR DENYING THE PETITION 4

A. The State Court Rulings that the Petitioner Presents for Review do not Involve a Federal Question 4

B. The Issues Presented by Petitioner were not Timely Raised in the Superior Court of the State of California 6

V. CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Page

Braxton v. U.S., 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991) 5

Hammerstein v. Superior Court of California, 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1195 (1951), rehearing denied, 342 U.S. 843, 72 S.Ct. 21, L.Ed. 637 (1951) 7

New York Times Co., v. Jascalevich, M.J., 439 U.S. 1317; 99 S.Ct. 6; 58 L.Ed.2d 25, reapplication denied, 438 U.S. 1331, 99 S.Ct. 11; 58 L.Ed.2d 38 (1978) 5

Rules

Rule 10.1(b) 4

Rule 10.1(c) 4

Statutes

United States Code, Title 28

Section 1254 1

Section 1254(3) 1

Section 1257 ..... 1, 2, 4

United States Code, Title 42

Section 2000(e)-2 6

No. 95-330

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

CHARLES HENRY CUNNINGHAM,
Petitioner,
vs.
WHITTIER UNION HIGH SCHOOL DISTRICT, et al.,
Respondents.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

I. JURISDICTION[1]

Petitioner erroneously indicates that 28 U.S.C. § 1254(3) provides jurisdiction for this court to hear this matter. However, 28 U.S.C. § 1254(3) does not exist. Specifically, 28 U.S.C. § 1254 has only two parts and both address cases in the Courts' of Appeal which may be reviewed by the Supreme Court. Clearly, this section does not apply to this case.

However, even if petitioner relies upon section, 28 U.S.C. § 1257, to invoke jurisdiction, he would still fail. Specifically, petitioner has not presented any federal questions

[1] Respondents accept petitioner's list of all parties to the proceeding.

pursuant to 28 U.S.C. § 1257 in either his petition for review before this Court or his petition for review before the Supreme Court of California.

II. CONSTITUTIONAL PROVISIONS INVOLVED

In his petition, petitioner alleges the fourteenth amendment to the United States Constitution is involved in this matter. However, not only is the fourteenth amendment not involved, neither is any other Constitutional provision, treaty, statute, ordinance or regulation of the United States involved in this matter.

III. STATEMENT OF THE CASE

This petition is taken from a final judgment disposing of all the issues between the parties. The petition is essentially concerned with the Superior Court's post-verdict hearing of September 24, 1992 and the Superior Court's November 12, 1992 granting of defendants' motion for judgment notwithstanding the verdict.

On May 9, 1991, petitioner commenced the underlying wrongful discharge and civil rights action. Whittier Union High School District and three (3) of its employees were charged with wrongful discharge and violation of public policy, violation of petitioner's civil rights, intentional interference with the prospective economic advantage, intentional infliction of emotional distress, breach of contract and breach of the covenant of good faith and fair dealing.

On September 3, 1992, the trial in this matter commenced. On September 11, 1992, the court granted defendants' motion for nonsuit as to plaintiff's cause of action for intentional interference with prospective economic advantage and plaintiff's request for punitive damages.

On September 24, 1992, the jury returned a verdict in favor of respondents as to petitioner's causes of action for wrongful termination in violation of public policy, violation of petitioner's civil rights and breach of contract. However, the jury returned a verdict in favor of petitioner on his cause of action for intentional infliction of emotional distress in the amount of $20,000.00 and for breach of the implied covenant of good faith and fair dealing in the amount of $77,170.00.

After the jury was excused, the trial court held a post-verdict hearing to determine the amount of judgment which would be entered. At that time, the Superior Court reduced the jury's verdict by $20,000.00, eliminating the award based on intentional infliction of emotional distress because petitioner had not proven that respondents violated a specific public policy or discriminated against petitioner on the basis of his race.

On October 16, 1992, respondents filed a motion for judgment notwithstanding the verdict, seeking to overturn the judgment in favor of petitioner on breach of implied covenant of good faith and fair dealing cause of action. This motion was based upon the argument that, because the jury found no breach of contract, petitioner could not state a cause of action for breach of implied covenant of good faith and fair dealing. On November 12, 1992, the court granted defendants' motion for judgment notwithstanding the verdict and entered a new verdict in favor of defendants and against petitioner. Final judgment in favor of all defendants was entered on December 16, 1992.

Petitioner thereafter unsuccessfully appealed to the California Court of Appeal and the California Supreme Court.

IV. REASONS FOR DENYING THE PETITION

A. The State Court Rulings that the Petitioner Presents for Review do not Involve a Federal Question.

28 U.S.C. § 1257, the Federal statute which permits this Court to review state court decisions, provides:

> "final judgment or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court by a writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any state is drawn into question on the ground of it being repugnant to the constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

The considerations governing review on a writ of certiorari have been expressed in Rule 10.1(b) and (c) of the rules of the Supreme Court of the United States as follows:

> "a review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling or fully measuring the Court's discretion, indicate the character of the reasons that will be considered... (b) when a State Court of last resort has decided a federal question in a way that conflicts with the decision of another state court of the last resort or of a United States Court of Appeals. (c) when a state Court or United States Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, or has

decided a Federal question in a way that conflicts with applicable decisions of this Court."

The principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Court of Appeals and State Courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991). Only final judgments bearing upon important issues of federal law provide the basis for the appellant jurisdiction of United States Supreme Court with respect to state court cases. *New York Times Co. v. Jascalevich, M.J.*, 439 U.S. 1317, 1318; 99 S.Ct. 6, 8; 58 L.Ed.2d 25, reapplication denied, 438 U.S. 1331, 99 S.Ct. 11; 58 L.Ed.2d 38, (1978).

Therefore, the critical issue in this Court's determination of the instant petition for writ of certiorari is the presence in the record of an important federal question which has been decided the California Supreme Court, California Court of Appeal or the Superior Court of the State of California.

This petition arises not out of concerns of federalism, but rather out of a party's dispute with the trial judge's correct application of California Law. This matter is clearly not worthy of further review here or elsewhere. Petitioner has erroneously attempted to assert that the aforementioned state court rulings on state law issues, decided solely under state law, somehow implicate important federal questions that conflict with the decision of another state court of last resort, United States Courts of Appeal, and/or the United States Supreme Court.

First, in his petition for writ of certiorari, petitioner alleges the California courts denied him his constitutional right to be free of a bias in the work place in its determination that the racial slur to the white petitioner by a black superior, and attendant damages, were not acceptable as a matter of

law, notwithstanding jury verdict. Here, plaintiff for the first time cites 42 U.S.C. § 2000(e)-2 and claims that the California courts denied petitioner the foregoing federal mandate prohibition against bias in the work place.

However, petitioner has incorrectly stated the facts of this case. It was the jury, not the court that decided the petitioner was not subject to, nor was he fired based upon, racial discrimination. Question No. 6 of the special verdict form clearly indicates the jury found that none of the defendants discriminated against plaintiff on the basis of his race at any time during his employment with defendant Whittier Union High school District.

Based upon this factual finding and California state law, the lower trial court correctly refused to enter judgment on the jury's verdict regarding petitioner's cause of action for intentional infliction of emotional distress. Based on California law, petitioner cannot state a cause of action against his employer or fellow employees for intentional infliction of emotional distress unless he has established that the conduct complained of was in violation of public policy. All California courts are in accord on this issue. Here, based on the jury's answer to special verdict question No. 6, petitioner did present not sufficient evidence to prove a claim of intentional infliction of emotional distress.

Additionally, petitioner alleges he was denied his constitutional right to due process and equal protection of the law based on the application of California state law. However, all plaintiff has done in his petition is reargue the interpretation of state law by state courts. Further review of such is not warranted or necessary by this Court.

B. The Issues Presented by Petitioner were not Timely Raised in the Superior Court of the State of California.

A petitioner's failure to use proper channels of review are a sufficient basis to deny a petition for writ of certiorari. *Hammerstein v. Superior Court of California*, 341 U.S. 491, 492; 71 S.Ct 820, 821; 95 L.Ed. 1195 (1951), rehearing denied, 342 U.S. 843, 72 S.Ct. 21, 96 L.Ed. 637 (1951).

Here, petitioner has failed to timely raise the issue presented in his petition for writ of certiorari before the Superior Court of the State of California. Specifically, in his petition, petitioner alleges that the jury was not fairly instructed as to what constitutes a violation of public policy and that the jury was given a misleading instruction of overall employer policy rather than prohibitions of racial discrimination in the work place.

However, plaintiff failed to object to the jury instruction describing the violation of public policy at the time of trial. Additionally, petitioner failed to timely raise this issue in his brief before the California Court of Appeal. Therefore, because plaintiff failed to properly and timely object to such jury instructions, the Court should not consider this argument.

V. CONCLUSION

Based on the foregoing, respondents respectfully request that this Court deny petitioner's petition for writ of certiorari.

DATED: September 20, 1995

Respectfully submitted,

LYNBERG & WATKINS
A Professional Corporation

By: NORMAN J. WATKINS
Attorneys for Defendants/ Respondents, Whittier Union High School District, a school district of Los Angeles County, Whittier High School, A subdivision of Whittier Union High School District, Paul Muschetto, Lee Panagos and Ron Perry

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 633 West Fifth Street, Suite 1400, Los Angeles, California 90071.

On September 20, 1995, I served the within Respondent's Opposition to Petition for Writ of Certiorari In Re: "Charles Henry Cunningham vs. Whittier Union High School District" in the United States Supreme Court, October Term 1995, No. 95-330, on all parties interested in said action, by placing three copies thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Post Office Mail Box at Los Angeles, California, addressed as follows:

Jacque Boyle
201 No. Figueroa Street, Suite 1425
Los Angeles, California 90012

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 20, 1995 at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA